STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JIMMY CRUZ,

Petitioner,

-against-

NEW YORK STATE BOARD OF PAROLE,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2826 Index No. 4130-11

Appearances: Jimmy Cruz
Inmate No. 96-A-7606
Petitioner, Pro Se
Eastern Correctional Facility
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Napanoch, NY 12458

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Eastern Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a determination of respondent dated September 8, 2010 to deny petitioner discretionary release on parole. Petitioner is serving a controlling

indeterminate term of eighteen years to life for attempted murder in the first degree, and a determinate sentence of twelve years for each of five counts of robbery in the first degree, all running concurrently to each other. Among the many arguments set forth in the petition, petitioner contends that he has been a model prisoner during his incarceration. He maintains that he had a troubled youth, was addicted to drugs and he (with a friend) committed commercial store robberies. He indicates that he has programmed extensively while incarcerated, including aggression replacement training, alternative to violence, narcotics anonymous, and transitional services (phase I, II & III). He indicates that he has completed various educational and religious programs, and vocational programs. He has obtained certified job titles in computer repair, building maintenance, food handling, small engine repair, and welding. Among the exhibits which he submitted in support of the petition he includes letters from staff members of the Department of Corrections and Community Service ("DOCCS") attesting that he is a good worker. Other letters, from family and friends are also submitted. In his view, he has taken advantage of all the rehabilitative opportunities available to him. He argues that the Parole Board failed to consider his release plans, and made only passing reference to his institutional programming. He maintains that the Parole Board failed to adhere to Executive Law § 259-i, including his community resources. He criticizes the Parole Board for placing too much emphasis on the seriousness of the crimes of which he is convicted.

The reasons for the respondent's determination to deny petitioner release on parole are set forth as follows:

> "Following a careful review of your records and of the interview it is the conclusion of this panel that if you were released at this time there is a reasonable probability that you would not live and

remain at liberty without violating the law and that your release would be incompatible with the public safety and welfare of the community. This decision was based upon the following. You come before this panel serving an 18 year to life sentence for the crimes of multiple robberies. Over a period of a couple of months, you and your codefendants committed a number of armed robberies. Most of the robberies involve you and your codefendant entering commercial stores, forcing the owners and victims to the back of the store. Hundreds of dollars were taken from the cash register, jewelry taken from victims. During one incident and in an attempt to flee you and your codefendants rammed a police car and fired shots at the officers.

"You and your codefendant conducted a two man crime spree and terrorized the community.

"Your criminal history dates back to the mid 1980's and includes an adjudicated YO robbery 2nd, a prior CPSP and CWP. This represents your third NYS bid and you were under parole supervision at the time of the I.O.

"All relevant matters have been considered including program completion, vocational training and letters of support. However, more compelling is the severity of the crimes, five armed robberies, prior bids and conduct while under previous community supervision."

As stated in Executive Law §259-i (2) (c) (A):

"Discretionary release on parole shall not be granted merely as a reward for good conduct or efficient performance of duties while confined but after considering if there is a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for law. In making the parole release decision, the procedures adopted pursuant to subdivision four of section two hundred fifty-nine-c of this article shall require that the following be considered: (i) the institutional record including program goals and accomplishments, academic achievements, vocational education, training or work assignments, therapy and interactions with staff and inmates; (ii) performance, if any, as

> a participant in a temporary release program; (iii) release plans including community resources, employment, education and training and support services available to the inmate; (iv) any deportation order issued by the federal government against the inmate while in the custody of the department and any recommendation regarding deportation made by the commissioner of the department pursuant to section one hundred forty-seven of the correction law; (v) any statement made to the board by the crime victim or the victim's representative, where the crime victim is deceased or is mentally or physically incapacitated; (vi) the length of the determinate sentence to which the inmate would be subject had he or she received a sentence pursuant to section 70.70 or section 70.71 of the penal law for a felony defined in article two hundred twenty or article two hundred twenty-one of the penal law; (vii) the seriousness of the offense with due consideration to the type of sentence, length of sentence and recommendations of the sentencing court, the district attorney, the attorney for the inmate, the pre-sentence probation report as well as consideration of any mitigating and aggravating factors, and activities following arrest prior to confinement; and (viii) prior criminal record, including the nature and pattern of offenses, adjustment to any previous probation or parole supervision and institutional confinement." (Executive Law §259-i [2] [c] [A]).

Parole Release decisions are discretionary and, if made pursuant to statutory requirements, not reviewable (Matter of De La Cruz v Travis, 10 AD3d 789 [3d Dept., 2004]; Matter of Collado v New York State Division of Parole, 287 AD2d 921 [3d Dept., 2001]). Furthermore, only a "showing of irrationality bordering on impropriety" on the part of the Parole Board has been found to necessitate judicial intervention (see Matter of Silmon v Travis, 95 NY2d 470, 476 [2000], quoting Matter of Russo v. New York State Bd. of Parole, 50 NY2d 69, 77 [1980]). In the absence of the above, there is no basis upon which to disturb the discretionary determination made by the Parole Board (see Matter of Perez v. New York State of Division of Parole, 294 AD2d 726 [3rd Dept., 2002]).

The Court finds that the Parole Board considered the relevant criteria in making its

decision and its determination was supported by the record. A review of the transcript of the parole interview reveals that, in addition to the instant offense, attention was paid to such factors as petitioner's institutional programming, his disciplinary record, and family (including his wife, children and stepchildren). It is evident from a reading of the transcript that the Commissioners had reviewed and considered the papers he had submitted, which included certificates of vocational programming, and letters from friends and family members in support of his release. The Commissioners gave the petitioner ample opportunity to speak on his own behalf.

Although the petitioner maintains that the Parole Board erred in not considering his future plans upon release, his inmate status report, which was a part of the record considered by the Parole Board, indicated that he intended to reside with his wife in Queens, New York; and that his plans for proposed employment were "to be developed". His short term plans were to get a job. His long term plans were to start a business as an electrician, construction worker or welder. If the petitioner had anything further to add to the foregoing, he should have mentioned it during his parole interview.

The decision was sufficiently detailed to inform the petitioner of the reasons for the denial of parole and it satisfied the requirements of Executive Law §259-i (see Matter of Siao-Pao, 11 NY3d 773 [2008]; Matter of Whitehead v. Russi, 201 AD2d 825 [3rd Dept., 1994]; Matter of Green v. New York State Division of Parole, 199 AD2d 677 [3rd Dept., 1993]). It is proper and, in fact, required, that the Parole Board consider the seriousness of the inmate's crimes and their violent nature (see Matter of Matos v New York State Board of Parole, 87 AD3d 1193 [3d Dept., 2011]; Matter of Dudley v Travis, 227 AD2d 863, [3rd Dept., 1996), as well as the inmate's criminal history (see Matter of Farid v Travis, 239 AD2d

629 [3rd Dept., 1997]; Matter of Cohen v Gonzalez, 254 AD2d 556 [3rd Dept., 1998]). The Parole Board is not required to enumerate or give equal weight to each factor that it considered in determining the inmate's application, or to expressly discuss each one (see Matter of Matos v New York State Board of Parole, supra; Matter of Young v New York Division of Parole, 74 AD3d 1681, 1681-1682 [3rd Dept., 2010]; Matter of Wise v New York State Division of Parole, 54 AD3d 463 [3rd Dept., 2008]). Nor must the parole board recite the precise statutory language set forth in the first sentence of Executive Law § 259-i (2) (c) (A) (see Matter of Silvero v Dennison, 28 AD3d 859 [3rd Dept., 2006]). In other words, "[w]here appropriate the Board may give considerable weight to, or place particular emphasis on, the circumstances of the crimes for which a petitioner is incarcerated, as well as a petitioner's criminal history, together with the other statutory factors, in determining whether the individual 'will live and remain at liberty without violating the law,' whether his or her 'release is not incompatible with the welfare of society,' and whether release will 'deprecate the seriousness of [the] crime as to undermine respect for [the] law'" (Matter of Durio v New York State Division of Parole, 3 AD3d 816 [3rd Dept., 2004], quoting Executive Law §259-i [2] [c] [A], other citations omitted).

In addition, the Parole Board's decision to hold petitioner for the maximum period (24 months) is within the Board's discretion and was supported by the record (see Matter of Tatta v State of New York Division of Parole, 290 AD2d 907 [3rd Dept., 2002], lv denied 98 NY2d 604).

The Court has reviewed petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds the decision of the Parole Board was not irrational, in violation of

lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly, it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated June 29, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 11 2011, Supporting Papers and Exhibits
3. Petitioner's Verified Reply

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SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Pre-Sentence Investigation Report, and respondent's Exhibit D, Confidential Portion of Inmate Status Report. For good cause shown, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice